A **MALAYSIAN NEWSPRINT INDUSTRIES SDN BHD**

v.

BECHTEL INTERNATIONAL INC & ANOR

B FEDERAL COURT, PUTRAJAYA
RAUS SHARIF PCA
ABDULL HAMID EMBONG FCJ
SURIYADI HALIM OMAR FCJ
HASAN LAH FCJ
C ZALEHA ZAHARI FCJ
[CIVIL APPEAL NO: 02( )-7-2011-(W)]
20 NOVEMBER 2012

D ***ARBITRATION:*** *Agreement - Construction - Arbitration clause - Whether contract between parties subject to arbitration clause - Whether there was agreement in writing in pleaded contract to refer dispute to arbitration - Whether courts erred in granting stay of proceedings- Arbitration Act 1952, ss. 2, 6*

E ***CIVIL PROCEDURE:*** *Stay of proceedings - Appeal against - Whether granting of stay conditional upon existence of arbitration agreement - Whether contract between parties subject to arbitration clause - Whether there was agreement in writing in pleaded contract to refer dispute to arbitration - Whether courts erred in granting stay of proceedings - Arbitration Act 1952, ss. 2, 6*

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CONTRACT: *Construction - Agreement - Clauses in agreement - Whether contract between parties subject to arbitration clause - Whether there was agreement in writing in pleaded contract to refer dispute to arbitration - Whether courts erred in granting stay of proceedings -*
G *Arbitration Act 1952, ss. 2, 6*

This was the appellant's appeal against the decision of the Court of Appeal in affirming the order of the High Court granting a stay of proceedings pursuant to s. 6 of the Arbitration Act 1952 ('the
H Act') which has since been repealed by the Arbitration Act 2005. Briefly, the facts showed that the appellant and the respondents had entered into a Technical Services Agreement ('TSA') wherein the respondents were to perform certain services ('project services'). Subsequently, in the High Court, the appellant had sued
I the respondents for breach of contract, negligence and breach of statutory duty. The principal issue in the courts below was

whether the contract giving rise to the respondents' engagement was subject to an arbitration clause. Both the High Court and the Court of Appeal held that the engagement was subject to a clause requiring the dispute to be referred to arbitration and for that reason, the appellant's case before the High Court was stayed. The appellant herein submitted that the Court of Appeal had erred in arriving at its decision, as under s. 6 of the Act, the granting of a stay was conditional upon the existence of an arbitration agreement that was applicable to the dispute before the court. According to the appellant, the dispute before the court was in relation to the project services provided by the respondents for an extended period. It was pointed out by the appellant that the pleaded contract of the appellant's case was based on the sixth proposal which, unlike the first five proposals, there was an omission to incorporate any reference to the TSA or an express arbitration agreement. The respondents, however, argued that while s. 2 of the Act requires an arbitration agreement to be in writing, there was no requirement that it was to be by way of a formal agreement executed between the parties.

Held (allowing appeal; setting aside order of stay)
Per Raus Sharif PCA delivering the judgment of the court:

(1) There was no agreement in writing in the pleaded contract to refer any dispute to arbitration. In fact, the Court of Appeal had accepted that the sixth proposal did not have the "subordinate clause" to say that the TSA which provide arbitration was incorporated into the sixth proposal. Since there was no such written agreement to refer the matter to arbitration in respect of the pleaded contract which was the subject matter of the suit, no stay of proceedings should be granted under s. 6 of the Act. (para 14)

(2) The Court of Appeal fell into error when it 'incorporated' the arbitration agreement by drawing inferences from the conduct of parties or documents other than the contract documents itself. The court was not at liberty to find an arbitration agreement by drawing inferences, without such an agreement being produced in writing or evidenced in writing. Further, for the purposes of a stay application under s. 6 of the Act, it was irrelevant that there was another arbitration agreement that was applicable to another document as per the findings

of the High Court. Thus, the courts below had erred in granting the stay of proceedings of the appellant's case under s. 6 of the Act.

(3) Whilst courts have always adopted minimal interference to parties wishing to have their dispute resolved by way of arbitration, such an intention must be evidenced by the clearest of terms and be reduced in writing as required under s. 2 of the Act and not by mere inferences.

Bahasa Malaysia *Translation of Headnotes*

Ini adalah rayuan perayu terhadap keputusan Mahkamah Rayuan mengesahkan perintah Mahkamah Tinggi membenarkan penangguhan prosiding di bawah s. 6 Akta Timbang Tara 1952 ('Akta') yang telah dimansuhkan oleh Akta Timbang Tara 2005. Secara ringkasnya, fakta-fakta menunjukkan bahawa perayu dan responden-responden telah memasuki satu Persetujuan Perkhidmatan Teknikal ('PPT') di mana responden-responden harus melaksanakan perkhidmatan-perkhidmatan tertentu ('perkhidmatan tertentu'). Seterusnya, di Mahkamah Tinggi, perayu telah mengambil tindakan terhadap responden-responden bagi pelanggaran kontrak, kecuaian dan kemungkiran kewajipan statutori. Isu utama di mahkamah-mahkamah di bawah adalah sama ada kontrak yang membangkitkan pelantikan responden-responden tertakluk kepada klausa timbangtara. Kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan memutuskan bahawa perlantikan tertakluk kepada klausa yang memerlukan pertikaian dirujuk kepada timbangtara dan atas sebab itu, kes perayu di hadapan Mahkamah Tinggi ditangguhkan. Perayu dalam kes ini, menghujahkan bahawa Mahkamah Rayuan telah terkhilaf apabila membuat keputusan tersebut, kerana di bawah s. 6 Akta, kebenaran penangguhan adalah tertakluk kepada kewujudan persetujuan timbangtara yang boleh digunapakai dalam pertikaian di hadapan mahkamah. Menurut perayu, pertikaian di hadapan mahkamah adalah berhubung dengan perkhidmatan-perkhidmatan tertentu yang diberi oleh responden-responden bagi satu tempoh yang dilanjutkan. Ia telah dinyatakan oleh perayu bahawa kontrak yang diplidkan dalam kes perayu berdasarkan cadangan keenam yang, bukan seperti lima cadangan sebelumnya, terdapat peninggalan untuk menggabungkan apa-apa rujukan kepada PPT atau persetujuan timbangtara. Responden-responden, walau bagaimanapun, menghujahkan

bahawa walaupun s. 2 Akta memerlukan persetujuan bertulis timbangtara, tiada keperluan untuknya dibuat melalui persetujuan rasmi antara dua-dua pihak.

Diputuskan (membenarkan rayuan; mengenepikan perintah penangguhan)
Oleh Raus Sharif PMR menyampaikan penghakiman mahkamah:

(1) Tiada persetujuan bertulis dalam kontrak yang diplidkan untuk merujuk apa-apa pertikaian kepada timbangtara. Mahkamah Rayuan telah menerima bahawa cadangan keenam tidak mempunyai "klausa" menyatakan PPT yang menyediakan timbangtara telah dimasukkan ke dalam cadangan keenam. Kerana tiada perjanjian bertulis untuk merujuk perkara kepada timbangtara berkenaan kontrak yang diplidkan yang menjadi hal perkara di dalam guaman ini, tiada penangguhan prosiding dibenarkan di bawah s. 6 Akta.

(2) Mahkamah Rayuan terkhilaf apabila ia 'memasukkan' persetujuan timbangtara melalui inferens-inferens daripada tingkahlaku pihak-pihak terlibat atau dokumen-dokumen selain daripada dokumen kontrak sendiri. Mahkamah tidak bebas untuk memutuskan bahawa terdapat persetujuan timbangtara melalui inferens-inferens, tanpa persetujuan sebegitu dikemukakan secara bertulis atau dibuktikan secara bertulis. Seterusnya, bagi tujuan permohonan penangguhan di bawah s. 6, ia tidak relevan bahawa terdapat satu lagi persetujuan timbangtara yang boleh digunapakai untuk dokumen yang lain seperti yang diputuskan oleh Mahkamah Tinggi. Oleh itu, mahkamah di bawah telah khilaf dalam membenarkan penangguhan prosiding kes perayu di bawah s. 6 Akta.

(3) Walaupun mahkamah selalunya menggunakan gangguan secara minimum ke atas pihak-pihak yang mengkehendaki agar pertikaian mereka diselesaikan melalui timbangtara, niat sebegitu mesti dibuktikan dengan terma-terma jelas dan bertulis seperti diperuntukkan di bawah s. 2 Akta dan bukan melalui inferens semata-mata.

Case(s) referred to:
Aughton Ltd v. M F Kent Services Ltd [1991] 57 BLR 1 ***(refd)***
Bauer (Malaysia) Sdn Bhd v. Daewoo Corporation [1999] 4 CLJ 665 CA ***(refd)***
Union of India v. Rallia Ram AIR 1963 SC 1685 ***(refd)***

Legislation referred to:
Arbitration Act 1952, ss. 2, 6

For the appellant - Darryl S C Goon (Choon Hon Leng with him); M/s Raja, Darryl & Loh
For the respondents - Robert Lazar (Rodney Gomez & Alexuis Lee with him); M/s Shearn Dellamore

[Editor's note: For the Court of Appeal judgment, please see Malaysian Newsprint Industries Sdn Bhd v. Bechtel International Inc & Anor [2009] 1 LNS 1825]

Reported by Suhainah Wahiduddin

JUDGMENT

Raus Sharif PCA:

Introduction

[1] This is an appeal by the appellant against the decision of the Court of Appeal dated 21 October 2009 affirming the order of the High Court dated 15 March 2006 granting a stay of proceedings against the respondents. The stay was granted pursuant to the then s. 6 of the Arbitration Act 1952 ("the Act") which has since been repealed by the Arbitration Act 2005.

[2] In the High Court, the appellant had sued the respondents for breach of contract, negligence and breach of statutory duty on the part of the respondents arising out of the latter's engagement as a consultant in respect of, *inter alia*, the design and construction of a newsprint mill.

[3] The principal issue in the courts below was whether the contract giving rise to the respondents' engagement was subject to an arbitration clause. Both the High Court and the Court of Appeal held that the engagement was subject to a clause requiring the dispute to be referred to arbitration and for that reason the appellant's case before the High Court was stayed pursuant to s. 6 of the Act.

[4] Leave to appeal was granted by this court on 25 January 2011 and the questions of law framed for determination in this appeal are:

Question 1

Whether for the purposes of an application for a stay under s. 6 of the Arbitration Act 1952, an arbitration agreement can be incorporated into the contract upon which the action is based without a written incorporation of the arbitration agreement itself?

Question 2

Whether for the purposes of an application for stay under s. 6 of the Arbitration Act 1952, the court can look beyond the contract upon which the action is based for an arbitration agreement which does not appear in and has not been incorporated in writing into the contract which the action is based?

Question 3

Whether for the purposes of an application for stay under s. 6 of the Arbitration Act 1952, the court can investigate, determine and make a finding that the operative contract between the appellant and the respondents is other than the one which the appellant contends is the operative contract and upon which the appellant had commenced its action?

Background Facts

[5] The background facts leading to this appeal are these. On 30 July 1996, the appellant and the respondents entered into a Technical Services Agreement ("TSA") wherein the respondents were to perform certain services ("project services"). The TSA contained an arbitration clause in Article XIII which provided that:

> any dispute arising out of this agreement shall be mutually resolved through good faith negotiations between OWNER and CONSULTANT. If the dispute is not resolved to the mutual satisfaction of both parties within thirty (30) days or such longer time as it mutually agreed the parties will attempt to resolve the dispute through the process of mediation.

Article XIII further provides that:

> if mediation fails, the OWNER and CONSULTANT agree to submit any such dispute or claim arising out of or relating to this agreement or breach thereof, to arbitration ...

[6] The project services were due to end on 30 September 1996. However before the end of the period, the parties entered into negotiations to extend the period of the project services beyond 30 September 1996. During this period of negotiations, the respondents continued performing the project services for the appellant.

[7] During the negotiations for the extended period of the Project Services, six proposals were submitted by the respondents. In these first five proposals, there was an express term incorporating the TSA, which included an arbitration clause. However, that express clause was conspicuously omitted in the sixth and final proposal made by the respondents.

Findings Of The Courts Below

[8] In the High Court, the learned judge was of the view that the contract between the parties for the extended project services was based on the third proposal and not the sixth proposal. Since the third proposal incorporated the TSA, which has an arbitration clause, the learned judge, applying s. 6 of the Act, allowed the stay application filed by the respondents.

[9] In the Court of Appeal, the learned judges were of the view that:

> both parties had always conducted themselves on the understanding that the Project Services for the extended period were subordinated to the TSA, and the appellant was estopped from denying the arbitration agreement.

The learned judges further held that:

> Notwithstanding the absence of the said subordination clause in the so called 6th proposal, the big picture was that the appellant had agreed to arbitration.

Submissions And Findings

[10] Before us, learned counsel for the appellant submitted that the Court of Appeal had erred in arriving at its decision, as under s. 6 of the Act, the granting of a stay was conditional upon the existence of an arbitration agreement that was applicable to the dispute before the court. According to him the dispute before the court was in relation to the project services provided by the

respondents for the extended period. He pointed out that the pleaded contract of the appellant's case was based on the sixth proposal which unlike the first five proposals there was an omission to incorporate any reference to the TSA or an express arbitration agreement.

[11] The learned counsel for the respondents submitted that both the High Court and the Court of Appeal were right in holding that the engagement was subject to a clause requiring the dispute to be referred to arbitration. The learned counsel submitted that while s. 2 of the Act requires an arbitration agreement to be in writing, there was no requirement that it was to be by way of a formal agreement executed between the parties. In support, learned counsel referred to us the case of *Bauer (Malaysia) Sdn Bhd v. Daewoo Corporation* [1999] 4 CLJ 665 which held that the phrase 'written agreement' in s. 2 of the Act does not demand a formal agreement to be executed by the parties to the dispute.

[12] Thus, the issue before us was basically whether the respondent's engagement for the extended period of the Project Services was subject to a clause requiring any dispute to be referred to arbitration. If there was such a clause, then both the courts below were right in granting the stay of proceedings pending arbitration. This is because s. 6 of the Act clearly provides:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration or any person claiming through or under him in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings apply to court to stay the proceedings ...

[13] Under s. 2 of the Act, an arbitration agreement means "a written agreement to submit present or future differences to arbitration". This must mean that an agreement to refer disputes to arbitration must be in writing and cannot be by way of inferences. In *Aughton Ltd v. M F Kent Services Ltd* [1991] 57 BLR 1, Sir John Megaw held:

> The object, or the effect, of that statutory requirement must be to emphasise, and seek to ensure, that one is not to be deprived of his right to have a dispute decided by a court of law, unless he has consciously and deliberately agreed that it should be so.

> Thus, if one party to a dispute under a contract wishes to litigate it in a court of law, it would be no answer for the other party to prove, by the clearest evidence, or even an admission, that there had been an oral agreement to arbitrate, which had not been reduced into writing or specifically evidenced by writing. If, as is the position by statute, an oral agreement will not suffice, it must surely follow that an agreement depending, in any essential part, on inference will not suffice.

[14] That is what exactly transpired in the instant case. The appellant wanted the dispute that had arisen to be decided by the court. The dispute arose from the sixth and final proposal made by the respondents which was accepted by the appellant. In other words, the appellant was suing the respondents for breaches under the sixth proposal and not under any other contract. Ultimately, the question is whether there was an agreement in writing in the pleaded contract to refer any dispute to arbitration.

[15] On the facts of this case, we found that there was no such agreement in writing. In fact the Court of Appeal accepted that the sixth proposal did not have the "subordinate clause" to say that the TSA which provide arbitration is incorporated into the sixth proposal. Since there was no such written agreement to refer the matter to arbitration in respect of the pleaded contract which is the subject matter of the suit, no stay of proceedings should be granted under s. 6 of the Act.

[16] The case of *Bauer (Malaysia) Sdn Bhd v. Daewoo Corporation (supra)* is of no assistance to the respondents. In fact the appellant derives support from the case of Bauer. The Court of Appeal in *Bauer* when referring to the Indian Supreme Court case of *Union of India v. Rallia Ram* AIR 1963 SC 1685 clearly highlighted that:

> ... By section 2(a) of the Arbitration Act 1940 "arbitration agreement" means "a written agreement to submit present or future differences to arbitration, whether an arbitration is named therein or not". A writing incorporating a valid agreement to submit differences to arbitration is therefore requisite.

[17] Thus, on the facts of this case, with respect, it is our considered view that the Court of Appeal fell into error when it "incorporated" the arbitration agreement by drawing inferences from the conduct of parties or documents other than the contract

documents itself. We agree with the appellant's contention that the court is not at liberty to find an arbitration agreement by drawing inferences, without such an agreement being produced in writing or evidenced in writing. Further, for the purposes of a stay application under s. 6 of the Act, it is irrelevant that there is another arbitration agreement that is applicable to another document (third proposal) as per the findings of the High Court. It is clear to us that based on the facts and evidence, the appellant did not make any claim under the third proposal. Thus, the courts below had erred in granting the stay of proceedings of the appellant's case under s. 6 of the Act.

[18] For completeness, we would like to state here that whilst courts have always adopted minimal interference to parties wishing to have their dispute resolved by way of arbitration, such an intention must be evidenced by the clearest of terms and be reduced in writing as required under s. 2 of the Act and not by mere inferences.

[19] In these circumstances, we would answer the three questions posed to us in the negative. The appeal is allowed. The order of stay granted by the courts below is hereby set aside.